NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

DEC 02 2004

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

JAMES DULANEY,

Petitioner - Appellant,

v.

RICK TONEY, Warden,

Respondent - Appellee.

No. 03-55597

D.C. No. CV-01-01832-TJW

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Thomas J. Whelan, District Judge, Presiding

Argued and Submitted November 3, 2004
Pasadena, California

Before: SCHROEDER, Chief Judge, GOULD and CLIFTON, Circuit Judges.

Petitioner James C. Dulaney appeals the district court's denial of his petition for writ of habeas corpus brought under 28 U.S.C. § 2254. We affirm.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Petitioner's habeas claim is governed by the Anti-Terrorism and Effective Death Penalty Act. Rios v. Rocha, 299 F.3d 796, 799 n.4 (9th Cir. 2002). Under AEDPA, a habeas petition cannot be granted unless the state court decision was: (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;" or was (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)-(2).

A. The Allegedly Improper Joinder of Counts 1 and 2

The district court did not err in upholding the California Court of Appeal's conclusion that the joinder of Counts 1 and 2 did not substantially prejudice the jury verdict. The Court of Appeal held that Petitioner had to show "substantial prejudice" in order to merit relief. This test is compatible with both Supreme Court and Ninth Circuit law. See United States v. Lane, 474 U.S. 438, 449 (1986); see also Davis v. Woodford, 384 F.3d 628, 638 (9th Cir. 2004).

Furthermore, the Court of Appeal's decision was not an "unreasonable application" of clearly established federal law to the facts of the case or "based on an unreasonable determination of the facts in light of the evidence presented." See 28 U.S.C. § 2254(d); Davis, 384 F.3d at 637-38. On at least two occasions, the trial court properly instructed the jury not to consider evidence from Count 1 when

deciding Count 2. See Lane, 474 U.S. at 450; Davis, 384 F.3d at 639. In addition, there was strong evidence that Petitioner committed the murder charged in Count 2 because he confessed to three witnesses and the jury found their testimony credible. See id. (considering the relative evidentiary strengths of the joined counts when conducting a prejudice analysis). Finally, all of the evidence was simple and distinct and easily compartmentalized by the jury. See id. (concluding that a jury has a better chance of compartmentalizing evidence and following a court's instructions to consider counts separately when the evidence of each crime is simple and distinct).

B. District Court's Failure To Hold an Evidentiary Hearing

Moreover, the district court did not abuse its discretion when it denied Petitioner's ineffective assistance of counsel claim without first holding an evidentiary hearing. See Karis v. Calderon, 283 F.3d 1117, 1126-27 (2002) (reviewing the denial of a request for an evidentiary hearing for an abuse of discretion). A petitioner is generally entitled to an evidentiary hearing if "(1) [his] allegations would, if proved, entitle him to relief; and (2) the state court trier of fact has not, after a full and fair hearing, reliably found the relevant facts." Jones v. Wood, 114 F.3d 1002, 1010 (9th Cir. 1997).

Petitioner has not alleged any facts that entitle him to relief. It was not clearly erroneous for the district court to determine that Petitioner's medical records failed to establish that his wounds made it impossible for him to have committed the murder charged in Count 2. See Lopez v. Thompson, 202 F.3d 1110, 1116 (9th Cir. 2000) (en banc) (stating that we review a district court's findings of fact for clear error). Moreover, Petitioner's conclusory and unsupported allegations that his treating physicians would have testified that he could not have committed the murder are not sufficient to entitle him to a hearing. See Campbell v. Wood, 18 F.3d 662, 679 (9th Cir. 1994) (holding conclusory allegations were insufficient to justify an evidentiary hearing).

AFFIRMED.